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No. 72-913

Supreme Court, U. S.
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In the Supreme Court of the United States

HARRISON J. CHERAMIE, JR.,
Plaintiff-Appellee-Applicant,

v.

STATE OF LOUISIANA,
Defendant-Appellant-Respondent.

OPPOSITION TO APPLICATION FOR WRIT OF REVIEW OR CERTIORARI TO REVIEW THE DECISION OF THE FIRST CIRCUIT COURT OF APPEAL OF LOUISIANA AND THE DENIAL OF WRITS BY THE LOUISIANA SUPREME COURT

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May It Please the Court:

Statement of the Case

This is an ordinary tort suit in which the plaintiff complains of injuries which he received when he swerved to avoid another motorist at a "T" intersection, his vehicle left the road and he was seriously injured. The other motorist carried no liability insurance. Plaintiff's suit against the Highway Department of the State of Louisiana for alleged negligence

was tried before a Louisiana district judge, who awarded plaintiff a large money judgment.

Pursuant to the provisions of Article 7, Section 29 of the Louisiana Constitution, the case was appealed by the defendant to the First Circuit Court of Appeal of the State of Louisiana. That court concluded that "the lower court committed manifest error in holding that the defendant was negligent, and that such negligence was a causative factor in the occurrence of the accident." (Applicant's brief, Appendix, p. 31).

A rehearing was requested by plaintiff and was denied by an *en banc* panel of the First Circuit, consisting of the original three members of the appellate panel and two additional appellate judges. The vote to deny rehearing was unanimous.

Plaintiff then applied to the Louisiana Supreme Court for a writ of certiorari or review. In accordance with the procedures of that court, the application was presented in succession to each justice and when four had concurred in a denial, the application was denied. There were no dissents to the denial.

Plaintiff then presented this application, claiming as the basis for federal jurisdiction a denial of due process under the Fourteenth Amendment to the United States Constitution.

Argument

Plaintiff is in error in his opening statement to

the Court that the Court of Appeal reversed the trial court's judgment "on the credibility of one witness." In fact, there were two witnesses whose testimony was before the court on the "one crucial issue" (Applicant's brief, p. 4) which was finally decided against plaintiff. There was no contradictory evidence of any kind adduced on the issue by plaintiff.

It is axiomatic that the plaintiff has the burden of proving the assertions which he makes. Plaintiff's crucial assertion in this case was that the state was negligent in its placement of a stop sign at the "T" intersection *and* that the state's negligence was a proximate cause of his injury. The latter portion of the burden could only be fulfilled if plaintiff was successful in demonstrating that the other driver *failed to see* the allegedly misplaced stop sign. On this point, plaintiff adduced no evidence whatsoever. The only evidence on the point was offered by defendant, through the testimony of the other driver (Ronald Lloyd) and the sworn statement of his father, who was in the car. Both stated that they *saw* the stop sign and that Ronald Lloyd *stopped* before entering the intersection.

Not only is this clear evidence that any negligence of the state was *not* a proximate cause of plaintiff's injury, it is the *only* evidence in the record on an issue on which plaintiff had the burden of proof.

Under the circumstances, the appellate court made the only decision which it could properly make,

and plaintiff's assertion that the appellate decision rested on its opinion of the credibility of one witness is misleading. It is a matter of law, not fact, that plaintiff has the burden of proof, and the appellate court's conclusion is, based on the evidence which plaintiff presented, that "the plaintiff has fallen short of establishing his case." (Applicant's brief, p. 32). And it was manifest error for the trial judge to conclude that plaintiff had established his case, judging from the record that was presented. The appellate court clearly so indicated when it stated "the lower court committed manifest error in holding that the defendant was negligent, and that such negligence was a causative factor in the occurrence of the accident." It is hardly a denial of due process for an appellate court of three judges, a rehearing panel of five appellate judges, and a state supreme court to reverse unanimously manifest error of a trial judge, particularly on an issue on which plaintiff failed to discharge his burden of proof.

Undoubtedly, plaintiff strives to present this matter as one in which a single "fact" determination by a lower court was reversed out of hand by an appellate court so that he can make the argument to this Honorable Court that his federal constitutional rights have been violated. This is the only possible federal issue in this litigation and of course it is being raised for the first time in this application.

The very same issue was presented to this court in an even stronger setting less than three months

ago and decided adversely to plaintiff in the consolidated cases decided under the names *Mayes et al v. Ellis et al*, No. 71-1668 ——— U.S. ———, 93 S.Ct. 289, 34 L.Ed.2d 214 (1972), *Hill v. McKeithen*, No. 71-1684 ——— U.S. ———, 93 S.Ct. 290, 34 L.Ed.2d 214 (1972), *Davis v. McKeithen* (writ denied, January 8, 1973) and *Lewis v. Ford Motor Company* (writ denied, January 8, 1973).

These eight cases, all decided in Louisiana district court by juries, were reversed by Louisiana appellate courts, under the appellate review of fact and law authorized by Louisiana Constitution Article 7, Section 29. They were consolidated for argument before a three-judge federal court convened for that purpose under the name *Melancon v. McKeithen*. The opinion of that three-judge court is to be found at 345 F.Supp. 1029 (E.D. La. 1972).

The assertion in those cases was that the Fourteenth Amendment of the United States Constitution made the Seventh Amendment applicable to the states, and that accordingly it was unconstitutional to permit a fact "tried by a jury to be otherwise re-examined in any court of the United States, than according to the rules of the common law." In a lengthy and scholarly opinion, that contention was rejected by the three-judge court, which reasoned that the provisions of the Seventh Amendment are not so fundamental to the American scheme of justice as to constitute a necessary ingredient of due process.

In the present application, plaintiff cannot even claim that both the Seventh and the Fourteenth Amendment are apposite, since this was not a fact "tried by the jury" but rather by the judge alone. Thus, he is reduced to a Fourteenth Amendment "due process" argument which, of course, has already been rejected by this court in the consolidated cases discussed above. This application therefore presents absolutely nothing new for this Honorable Court to consider.

Plaintiff is understandably distressed that in the final analysis his suit was unsuccessful. But the fact remains that, in perfect accordance with the Louisiana constitution and the federal constitution, the original three-judge appellate court concluded that manifest error had been committed by the trial judge; the *en banc* panel of five appellate judges re-affirmed that ruling by refusing a rehearing; and the Louisiana Supreme Court without dissent refused plaintiff's petition for certiorari.

Plaintiff has been extended exhaustive "process of law" in this litigation and presents to this Honorable Court a weaker position on an issue already decided adversely to him not three months ago.

It is respectfully submitted that plaintiff's application for a writ of certiorari or review should be denied.

Respectfully submitted,

By Attorneys for the State of Louisiana, through the Department of Highways

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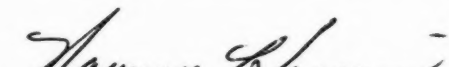
By: 
Norman L. Sisson

CERTIFICATE

I hereby certify that copies of the foregoing have this day been mailed by U. S. mail, postage prepaid, to Arthur Cobb, Esq., 3101 Dalrymple Drive, Baton Rouge, Louisiana 70802, of counsel for applicant.

Baton Rouge, Louisiana, this 12th day of January, 1973.

Norman L. Sisson